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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BRADLEY RICHIE,

Petitioner,

v.

THOMAS A. COUGHLIN, III, INDIVIDUALLY AND AS COMMISSIONER OF THE DEPARTMENT OF CORRECTIONAL SERVICES; THE DEPARTMENT OF CORRECTIONAL SERVICES; KAREN S. BURSTEIN, INDIVIDUALLY AS COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE AND AS PRESIDENT OF THE CIVIL SERVICE COMMISSION; JOSEPHINE L. GAMBINO AND JAMES J. MCFARLAND, EACH INDIVIDUALLY AND AS COMMISSIONERS OF THE CIVIL SERVICE COMMISSION; THE CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK; AND THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT

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QUESTIONS PRESENTED

I. Did the New York State Supreme Court, Appellate Division, Third Department err in holding that petitioner's due process rights were not violated by respondents' failure to provide him with pretermination notice that his permanent civil service appointment was being revoked?

II. Did the New York State Supreme Court, Appellate Division, Third Department, err in holding that petitioner's due process rights were not violated by respondents' failure to provide petitioner with adequate post-termination review of the revocation of his permanent civil service appointment?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT APPELLATE DIVISION, THIRD DEPARTMENT

Petitioner, Bradley Richie, respectfully prays that this Court grant a writ of certiorari to review the judgment of the New York State Supreme Court, Appellate Division, Third Department entered in this procedural due process action on August 2, 1989.

OPINIONS BELOW

The opinion of the New York State Supreme Court, Appellate Division, Third Department is reported at 148 A.D.2d 178, 544 N.Y.S.2d 230, (1989). It appears as Appendix C to this petition at C-1-10.

The opinion of the New York State Supreme Court, granting petitioner's motion for summary judgment was decided on May 20, 1988. The decision is unreported. It appears as Appendix D to this petition at D-1-8.

JURISDICTION

The order of the New York State Supreme Court, Appellate Division, Third Department, was entered on August 2, 1989. The order of the New York State Court of Appeals dismissing the appeal as of right was entered on December 19, 1989. The order of the New York State Court of Appeals denying the motion for permission to appeal was entered on March 27, 1990. This petition for certiorari is filed within ninety days of that date. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section I, provides that:

> ...[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . .

2. Title 42 of the United States Code, Section 1983, provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or

the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. New York State Constitution, Article I, §6, provides, in pertinent part:

...No person shall be deprived of life, liberty or property without due process of law.

This statute is printed verbatim as Appendix E to this petition at E-1-2.

4. New York *Civil Service Law* §75 provides, in pertinent part:

I. Removal and other disciplinary action. A person described in paragraph (a) ...shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section...

(a) A person holding a position by permanent appointment in the competitive class of the classified service...

This statute is printed verbatim as Appendix F to this petition at F-1-3.

5. New York *Civil Service Law* §50 provides, in pertinent part:

(4) Disqualification of applicants or eligibles. The state Civil Service Department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible...

(f) who has intentionally made a false statement of any material fact in his application; or

(g) who has practiced...any deception or fraud in his application...No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefore and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

(h) Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.

This statute is printed verbatim as Appendix G to this petition at G-1-6.

6. New York *Civil Service Law* §6 provides, in pertinent part:

(5) Hear and determine appeals instituted by any person believing himself aggrieved by any action or determination of the present of the commission acting as the head

of the department, made under the authority conferred upon such president or department under the provisions of this chapter except article eleven hereof; provided, however, that no such appeal shall be allowed (a) if the action or determination involved relates solely to matters of internal management of the department, or (b) if the action or determination involved was considered and approved in advance by the commission. The appeals authorized by this subdivision shall be instituted by applications in writing to the commission within thirty days of the action or determination to be reviewed. The commission, for good cause shown, may waive such thirty-day limitation. The commission may make such investigation or inquiry into the facts relative to the action or determination appealed from as may be deemed advisable and may affirm, reverse or modify such action or determination;

This statute is printed verbatim as Appendix H to this petition at H-1-3.

7. New York *Civil Service Rules and Regulations* §66.4 provides, in pertinent part:

(a) The State Civil Service Department may conduct investigations concerning the qualifications of candidates, eligibles and appointees for State positions or public authorities under the jurisdiction of the department...The investigation of candidates, eligibles or appointees shall be as complete as is necessary to make an informed evaluation and determination.

This statute is printed verbatim as Appendix I to this petition at I-1-2.

STATEMENT OF CASE

Introduction

This state court action was brought by the petitioner, Bradley Richie, under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983 (1981). The primary issue is whether petitioner was deprived, without procedural due process, of a constitutionally protected property interest in his continued public employment. Petitioner's contention is that respondents failed to give him prior notice that his permanent civil service appointment was being revoked and also failed to provide an adequate post-deprivation hearing to review the revocation decision. The petitioner's case is very similar, factually and legally, to *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). Petitioner submits that the New York courts have misapplied the *Loudermill* holding in his case.

Facts

Petitioner served two tours of duty in Vietnam and was honorably discharged from the United States Marine Corps in April, 1970. App. C at 4. In August 1970, petitioner was arrested in North Carolina for possession of less than one gram of marijuana and hashish. App. C at 4. In November, 1970, he pleaded guilty to a misdemeanor charge and was sentenced to 18 months in a county jail. In March 1971, after serving four months of his sentence, petitioner "escaped" from jail by failing to return to the jail after attending an off-site church service.

From 1973 to 1977 petitioner attended Mesa College in Grand Junction, Colorado. He graduated with a Bachelor of Arts degree in Human Services.

In 1983, petitioner was appointed by the New York State Department of Correctional Services (hereafter "DOCS") as a Temporary Release Interviewer and was assigned to the Ogdensburg Correctional Facility. He successfully completed his probationary period under *Civil Service Law* §75 (McKinney 1987) (hereafter "*CSL*") and became a permanent or "tenured" appointee to that position in December 1983. App. C at 4. App. D at 5.

In June 1985, petitioner was charged in New Hampshire with driving while intoxicated. App. C at 4. A computer check revealed a 14-year-old North Carolina escape warrant. App. C at 5. App. D at 5. With petitioner's agreement, the New Hampshire authorities transferred Mr. Richie to North Carolina authorities on June 21, 1985. App. C at 5.

By letter dated June 17, 1985, DOCS requested that the New York State Department of Civil Service revoke petitioner's permanent civil service appointment. App. C at 5. DOCS' letter said that petitioner had checked the "No" box in response to Question 11.d ("Have you ever been convicted of any crime?") in his examination application. DOCS also stated that petitioner had avoided detection by changing the spelling of his last name, changing his date of birth, and altering his social security number. App. C at 5. App. D at 5. Finally, DOCS' letter stated that it had "confirmed" petitioner had been convicted of "Felony Narcotic Possession" and that he was being transported "back to North Carolina this week."

On July 8, 1985, John Sterrett, the Civil Service Department's Director of Investigations, mailed the petitioner a Notice of Possible Disqualification, under New York *CSL* §50(4). App. C at 5. Despite having been advised that petitioner was in custody in North Carolina, this Notice was mailed to the petitioner at a Ray Brook, New York address. Petitioner, however, had moved from Ray Brook to Canton, New York approximately

one year earlier. DOCS had petitioner's correct address. App. C at 5. The Notice was returned to Civil Service on July 12, 1985, stamped "Authorized time for forwarding has expired." App. C at 5.

On July 22, 1985, Mr. Sterrett mailed another letter to petitioner, revoking his appointment under *CSL* 50(4). App. D at 5. Despite actual knowledge that petitioner was in North Carolina, App. C at 5, App. D at 5, and that the address to which the prior notice had been sent was out of date, this letter was mailed to the same out-of-date address, allegedly "as required" by Civil Service's procedures. Of course, this letter was also returned undelivered. App. C at 5.

On July 25, 1985, the North Carolina authorities voluntarily dismissed the fugitive case against petitioner. App. D at 5. The North Carolina Parole Commission favorably reviewed petitioner's activities in years subsequent to his escape and on August 6, 1985, released and paroled petitioner. App. C at 5. It then immediately terminated his parole. App. D at 5. Petitioner returned to his home in Canton on August 8, 1985. He then challenged his termination through a grievance filed by his Union.

In late September 1985, an official of the New York State Civil Service Department's Affirmative Action Program questioned petitioner's termination in an intensely critical internal memorandum to Mr. Sterrett. App. C at 5. Prompted by this letter, on October 7, 1985, Mr. Sterrett wrote to petitioner. This letter stated, in part: "Although the revocation decision has been made, we will again afford you an opportunity to make an explanation and submit facts in opposition to the determination made on July 22, 1985." Petitioner was asked to explain why he had checked the "No" box in response to the question about prior convictions. The letter also asked petitioner to explain the other "derogatory information" supplied by DOCS.

By letter dated November 7, 1985, petitioner's attorney responded by requesting that petitioner be granted a hearing before a neutral adjudicator so that he could present all evidence relevant to the revocation of his appointment under CSL 50(4). Mr. Sterrett responded by letter dated November 18, 1985. He upheld the revocation decision and denied plaintiff's request for a hearing. He also advised that petitioner could appeal his determination to the New York State Civil Service Commission (hereafter "Commission"), and that his attorney's letter of November 7 would be treated as an appeal. App. C at 6.

Petitioner was advised that the Commission would hear his appeal on December 17. At the request of petitioner's counsel, a meeting was held on December 12, 1985, between officials of the Civil Service Department and petitioner's counsel. At that meeting, petitioner's counsel raised several objections to the revocation procedure the Civil Service Department had followed and asked that a proper procedure be established and followed. Despite this request, no information was provided as to the procedures which would govern the Commission "appeal."

On December 16, 1985, petitioner made a written submission to the Commission. This letter sought rescission of the Civil Service Department's July 22, 1985 revocation determination and the reinstatement of the petitioner until proper pretermination due process was provided. App. D at 6. The petitioner also requested a new investigation under *CSL* §50(4), which complied with due process. The petitioner requested that the revocation procedures include notice of the reasons for revocation; a statement of the hearing procedures; a neutral decisionmaker; the right to present evidence and cross-examine witnesses and a transcript. App. D at 6.

On December 17, 1985, the Commission convened to consider the revocation of the petitioner's appointment. App. D at 6. At this "appeal," petitioner's counsel reiterated the re-

quest for the procedures which were to be followed in the appeal and upon whom the burden of proof lay. This request was ignored and no information was supplied.

The Commission heard first from the State Department of Civil Service, which stated that the initial revocation was based, in part, on petitioner's attempt to avoid detection of his 1970 arrest by changing his name, his birth date and his social security number. Neither the Department of Civil Service nor DOCS offered any evidence at the Commission hearing to support these allegations. The petitioner denied these allegations. The petitioner responded orally to the allegation that he intentionally falsified his application and was questioned by the Commission about this allegation. The petitioner also raised facts in mitigation, including the fact that he had been diagnosed as suffering from post-traumatic stress syndrome as a result of his duty in Vietnam.

DOCS introduced evidence of petitioner's allegedly poor work record and prior discipline. It also raised an issue about petitioner's DWI arrest and that he allegedly gave false information to the New Hampshire police. This evidence was received, over the objection of petitioner's attorney, despite the fact that there was no prior notice that these issues would be considered.

The petitioner's request for a stenographic record was denied. "Witnesses" were not sworn. Several documents were submitted *ex parte* by DOCS and the Department of Civil Service. These included Mr. Sterrett's investigation report, which consisted of a five page statement of the "facts" of the case. This report argued against the mitigating factors raised by petitioner. It also cited a local newspaper article, which contained what purported to be an admission that petitioner had falsified his application. The petitioner and his counsel did not learn that this "evidence" had been submitted to the Commission until they received respondents' answering papers in this legal action.

On January 14, 1986, the Commission upheld the revocation of petitioner's appointment, but awarded petitioner backpay for the period August 9, 1985, the date he was again available for work, through January 15, 1986. App. C at 6. The petitioner then instituted this action.

SUMMARY OF ARGUMENT

This case presents serious issues of procedural due process. Respondents revoked Mr. Richie's permanent civil service position without giving him pretermination notice or an opportunity to respond. Moreover, the petitioner was denied an adequate post-termination hearing to review the revocation decision.

The petitioner respectfully submits that the Appellate Division made three mistakes in deciding this case. First, the court did not properly analyze petitioner's property interest. Mr. Richie, as a civil servant who had successfully completed his probationary term, had a constitutionally protected property interest in his continued employment which could only be terminated for those causes enumerated under *CSL* §§50(4) or 75. While the Appellate Division agreed that Mr. Richie had a constitutionally protected property interest in his continued employment, it found that property interest to be "limited" by *CSL* §50(4). It is petitioner's contention that *CSL* §50(4) does not limit the property interest which petitioner had or the procedural protections which must apply when the State seeks to terminate that interest. Rather, *CSL* §50(4) merely enumerates the substantive causes upon which the termination of that property interest can be based.

Second, once a property interest in continued employment is established, governmental officials who seek to terminate that interest must, under *Loudermill*, give the affected employee pretermination notice and an opportunity to respond. *Id.* at 542.

This was not done in the instant case. The Appellate Division erred in holding that this failure was remedied by an award of backpay.

Third, the Appellate Division incorrectly held that Mr. Richie received adequate post-termination due process to review the revocation of his appointment. As determined in *Loudermill*, while basic notice and opportunity to respond is all that is required prior to the termination of a "tenured" civil servant's public employment, an actual hearing is required after the termination has occurred. *Id.* at 546-547. While the revocation of Mr. Richie's appointment was subject to an appeal to the State Civil Service Commission, this post-termination review procedure was constitutionally inadequate. The appeal was not governed by written procedures. Evidence was submitted by the respondents to the Commission *ex parte*. "Testimony" was not under oath. While witnesses were allowed to be questioned, their answers were not preserved. There was no transcript or written record, making judicial review impossible. The Commission was not required to base its determination on the record adduced before it.

Post-termination review of the revocation of a permanent civil service appointment should include the elementary procedural requirements of a fair trial. These are: notice of the charges and of the procedures to be followed, as well as who has the burden of proof; the opportunity to present evidence and to see and challenge evidence submitted by one's adversaries; an impartial decisionmaker who bases the decision on the record adduced at the hearing; and a record of the proceedings which is adequate to permit judicial review.

Litigation History

The New York State Supreme Court granted summary judgment for petitioner. Appendix D. It ruled that respondents had deprived petitioner of his constitutional right to due process

by failing to provide him with adequate notice and an opportunity to respond prior to the revocation of his appointment. It also found the post-termination review procedure to be constitutionally deficient. App. D at 8.

The New York State Supreme Court, Appellate Division, Third Department, reversed. Appendix C. The court recognized that petitioner did not receive pretermination notice and an opportunity to respond. The court decided, however, that this was remedied by the Commission's award of backpay. This, according to the court, effectively transformed petitioner's termination into a suspension with pay. App. C at 9. Thus, the court reasoned that petitioner's real termination did not come about until after his hearing before the Commission, at which petitioner did have notice and an opportunity to respond. App. C at 9. Based on this, the court found that reinstatement and a further hearing would be "redundant." App. C at 9.

The Appellate Division also held that petitioner had a "limited" property interest under *CSL* §50(4), in that where facts are discovered which would warrant revocation, the employee "...is entitled to expect that where there are sufficient mitigating circumstances he will not be terminated." App. C at 8. In making this ruling, the court held that a pretermination opportunity to respond, coupled with post-termination administrative review, met the constitutionally required "...minimum with respect to the limited property interest involved here." App. C at 9. The court also rejected petitioner's argument that his Civil Service Commission "hearing" had to be conducted in accordance with the requirements set forth in the New York *State Administrative Procedure Act* for adjudicatory hearings. The court held this claim to be without merit because the Civil Service Commission "appeal proceeding" did not have to be made "on the record." App. C at 9.

Thereafter, the New York Court of Appeals dismissed petitioner's appeal as of right, finding no substantial constitution-

al issue. App. B at 1. It then denied his motion to appeal by permission. App. A at 2.

ARGUMENT

POINT I

THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT ERRED IN HOLDING THAT PETITIONER POSSESSED A "LIMITED" PROPERTY INTEREST.

The first step in a due process case is to determine that some interest in liberty or property is being disturbed or threatened by persons acting under color of state law. *Board of Regents v. Roth*, 408 U.S. 564, 576-577 (1972). It is petitioner's contention that as an employee who had successfully completed his probationary term and had received a permanent civil service appointment, he obtained a constitutionally protected property interest in his continued public employment which could not be terminated without procedural due process. Under New York law, there is no question that a permanent civil servant has a constitutionally protected property interest in his continued public employment. *Economico v. Village of Pelham*, 50 N.Y.2d 120, 125, 428 N.Y.S.2d 213, 215 (1980).

As to this threshold issue, the respondents contended that since petitioner had falsified his application, his property interest was fraudulently obtained and therefore void *ab initio*. *See, e.g. Prasad v. Merges*, 65 A.D.2d 663, 409 N.Y.S.2d 815 (3rd Dept. 1978), *lv. to app. denied* 46 N.Y.2d 712, 416 N.Y.S.2d 1026, *cert. denied*, 444 U.S. 861, *reh'g denied*, 444 U.S. 958 (1979). This was virtually the same argument raised by the employer and rejected by this Court in *Loudermill, supra*, at 539,

fn. 5; *see also, Berns v. Civil Serv. Comm'n*, 537 F.2d 714, 716-717 (2d Cir. 1976).

The Appellate Division, in deciding this issue, reached a middle ground. It reasoned that if the termination of a public employee who falsified his or her application were required by *CSL* §50(4), then respondents' "void *ab initio*" argument would be correct. App. C at 7. It found, however, that since the revocation of an appointment for the causes set forth under *CSL* §50(4) is discretionary, then an employee:

> ...in petitioner's position has a constitutionally protected property interest in his employment that survives Civil Service Law §50(4) albeit in a limited form, in that he is entitled to expect that where there are sufficient mitigating circumstances he will not be terminated. [App. C at 8.]

Based on its finding of this "limited" property interest, the court held that the procedural protections afforded petitioner were adequate to insure that there was a proper exercise of discretion in this case. App. C at 8.

The Third Department's analysis of petitioner's property interest was erroneous. Petitioner's property interest was not limited to an expectation that if he could show mitigation he would not be terminated. Rather, petitioner had a legitimate expectancy, founded on *CSL* §§50(4) and 75, that his public employment would continue absent a finding of one of the substantive causes for termination set forth in those statutes. The question of what procedures are attendant to the finding of cause is wholly separate from the issue of the scope of the substantive interest.

This Court has held that a key element in determining whether there is a property interest in public employment is whether the employee can be fired only "for cause." *Loudermill, supra*, at 538-539; *see also, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982). Petitioner successfully completed his proba-

tion and became permanent or "tenured." App. C at 4. As such, under *CSL* §75 he could only be terminated for incompetency or misconduct. The fact that *CSL* §50(4) sets forth additional substantive causes upon which the State may act to terminate one's public employment does not destroy or limit this protected interest. Again, this contention was rejected in *Loudermill:*

> The Cleveland Board of Education now asserts that Loudermill had no property right under state law because he obtained his employment by lying on the application. It argues that had Loudermill answered truthfully, he would have not been hired. He therefore lacked a 'legitimate claim of entitlement' to the position [citation omitted].
>
> * * *
>
> ...[this] argument relies on a retrospective fiction inconsistent with the undisputed fact that Loudermill was hired and did hold the security guard job. The Board cannot escape its constitutional obligation by rephrasing the basis for termination as a reason why Loudermill should not have been hired in the first place. [*Id.* at 539, fn.5.]

Thus, the Appellate Division's decision confuses the issue of the scope of the property interest with the issue of what procedures are constitutionally required before there can be a deprivation of that interest. In effect, the Appellate Division held that since the employer had "discovered" facts which, if known prior to the appointment, would have warranted disqualification, petitioner's property interest becomes limited to a discretionary review of mitigating factors. App. C at 8. Thus, the extremely limited procedures afforded to Mr. Richie were held to be adequate to safeguard this limited interest.

As found by this Court in *Loudermill*, *id.* at 539, fn.5, and by Justice Cheeseman of the New York State Supreme Court, this reasoning puts the proverbial cart before the horse. App. D at 7. The Appellate Division's analysis missed the real point of the procedural due process inquiry: what procedural safeguards are required to insure that the process which leads to the finding of cause for revocation is constitutionally adequate?

This Court has repeatedly stressed that the scope of protected interests cannot be limited by statutory procedures — even by those contained in the statute which creates the substantive interest. To so confuse substance and procedure reduces the constitutional guarantee of due process to a mere "tautology." *Loudermill, supra,* at 541. *CSL* §50(4) sets forth substantive causes for termination of continued employment and makes termination discretionary if those causes are found to exist. This has nothing to do with the required procedural safeguards attendant to making the determination of whether these substantive causes exist or, if they do, what procedures are required to insure that discretion is fairly exercised.

In short, there is a substantial issue of whether the Appellate Division erred in finding that petitioner's property interest was "limited" under *CSL* §50(4) to a discretionary review of mitigating factors. The Appellate Division should have determined that petitioner, a civil servant who successfully completed his probation and became "tenured," had an expectancy that his employment would continue absent a finding that a cause existed to terminate that employment on one of the bases set forth under *CSL* §75 or §50. The court should then have turned to an analysis of what procedures were constitutionally required to make those findings.

POINT II

THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, THIRD DEPARTMENT, ERRED IN HOLDING THAT PETITIONER'S CONSTITUTIONAL RIGHT TO PROCEDURAL DUE PROCESS WAS NOT VIOLATED BY RESPONDENTS' FAILURE TO PROVIDE PETITIONER WITH PRETERMINATION NOTICE AND AN OPPORTUNITY TO RESPOND PRIOR TO THE REVOCATION OF HIS APPOINTMENT.

The petitioner was deprived of procedural due process when his permanent civil service appointment was revoked without pretermination notice. The Appellate Division's holding that this deprivation was effectively remedied by an award of back-pay was incorrect, in that the back pay award did not restore to the petitioner the lost opportunity to have the facts of his case fairly decided and to favorably invoke the discretion of the decisionmaker.

In analyzing the procedural protections due before a property interest in continued employment can be terminated, the weight of the interest affected has to be considered. As noted in *Loudermill:*

> ...the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood [citations omitted]. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job [citation omitted]. *Id.* at 543; *accord, Brock v. Roadway Express, Inc.*, 481 U.S. 252, 263 (1987).]

Determining what procedural protections were due in this case is not difficult. *Loudermill* is precisely on point — it involved a civil servant whose employment was terminated under an Ohio statute for falsely stating on his employment application that he had never been convicted of a felony. *Id.* at 535. His state law remedy was an appeal to the Ohio Civil Service Commission, *id.* at 536, the decision of which was subject to judicial review. *Id.* at 539, fn. 6. Based on these strikingly similar facts, this Court held that post-termination due process was insufficient and that "essential, fundamental" due process required that before termination, the employee was entitled to "...oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Id.* at 546. Pretermination notice was found to be essential because:

> ...even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect. [*Loudermill, supra*, at 543.]

Loudermill thus imposes three procedural protections which must be accorded to an employee *prior* to termination. The employee must be given notice of the charges against him, an explanation of the employer's evidence and an opportunity to respond. *Loudermill, supra*, at 546.

In this case, as noted by the Appellate Division, petitioner was not afforded any of these protections. App. C at 9. The Department of Civil Service, in accordance with its usual procedure, sent its notice to petitioner's last known address, even though it had actual knowledge that petitioner was incarcerated in North Carolina. App. C at 5. App. D at 5. Even after this notice was returned undelivered because the time for for-

warding the mail from that address had expired, the Department sent its final revocation notice to that same out-of-date address. App. C at 5. App. D at 5, 7.

This was clearly insufficient under *Loudermill.* Where notice is required, this Court has always insisted that some means designed to insure actual notice be used. *Mullane v. Central Hanover Bank,* 339 U.S. 306, 315 (1950); and *Lambert v. California,* 355 U.S. 225, 228 (1957). In this case, respondents knew Mr. Richie was in North Carolina, and knew that their letters were being mailed to an outdated address. Yet, claiming to be following "procedure," this was the only attempt they made to provide pretermination notice.

This failure to provide notice led to a decision to terminate Mr. Richie which was based on faulty findings of fact— that Mr. Richie had been convicted of a felony; and that he had attempted to avoid detection by changing the spelling of his name, his date of birth and his social security number. Had the Department of Civil Service made a reasonable effort to contact Mr. Richie before terminating his employment, it would have learned that these allegations were false. While this might not have changed the ultimate decision, it would have at least provided Mr. Richie with the "meaningful opportunity to invoke the discretion of the decisionmaker" to which he was entitled under *Loudermill.*

The Third Department decided that this failure of pretermination notice was remedied by the appeal to the Civil Service Commission. The court held that the Commission's award of back pay was in "apparent" recognition of the failure of pretermination notice. App. C at 9. According to the court, this effectively turned petitioner's initial termination into a suspension with pay. App. C at 9. Mr. Richie then received notice of the charges and an opportunity to be heard at the Commission ap-

peal. App. C at 9. This reasoning ignores the facts of this case[1] as well as the statutory scheme.

The appeal to the Civil Service Commission was not a pretermination hearing. Under New York law, it was a proceeding to review the action by the Department of Civil Service in revoking petitioner's appointment. *CSL* §6(5). Petitioner had already been fired and was off the payroll at the time this "hearing" took place. More importantly, an award of back pay cannot replace the lost opportunity to favorably invoke the discretion of the employer. Again, this is a primary reason for requiring notice and an opportunity to respond *prior* to termination. *Loudermill, supra* at 543. Only a remand for a new investigation by a new investigator could have restored that opportunity to petitioner.

Whether this would have led to a different result is not important. Due process not only safeguards the individual from wrongful or erroneous deprivation by government officials, but serves an important societal interest in giving an affected person the assurance that he or she has been treated fairly by the government. *Carey v. Piphus*, 435 U.S. 247, 261 (1978). Because of this, procedural due process rights are "absolute" and do not depend upon a showing that the person whose liberty or property interest is being threatened can successfully defend on the merits. *Id.* at 266; *see also, Loudermill, supra*, at 543.

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[1] The Appellate Division's finding that the award of back pay was somehow a recognition of the respondents' failure to provide the required pretermination process to petitioner is contradicted by the record. Although the Commission never explained the back pay award, an affidavit submitted by counsel for the Department of Civil Service states that the Commission "deemed" 4 NYCRR 66.4 (Appendix I) to apply to petitioner. Of course, that the appeal was allegedly governed by this regulation was never communicated to petitioner or his counsel, despite repeated requests for a statement of the procedures governing the appeal.

Mr. Richie was denied the pretermination notice and opportunity to be heard to which he was clearly entitled under *Loudermill*. The Appellate Division's decision, holding that Mr. Richie's constitutional rights were not violated, is erroneous and warrants the review of this Court.

POINT III

THE APPELLATE DIVISION ERRED IN HOLDING THAT THE APPEAL PROCEDURES OF THE NEW YORK STATE CIVIL SERVICE COMMISSION SUPPLY ADEQUATE POST-TERMINATION DUE PROCESS FOR THE REVOCATION OF THE APPOINTMENT OF A PERMANENT CIVIL SERVANT.

The third serious due process issue presented is whether the post-termination review procedure was adequate. As noted, a revocation decision under *CSL* §50(4) may be appealed to the Commission under *CSL* §6(5). Indeed, had petitioner failed to pursue such an appeal, his case would have been subject to dismissal for failure to exhaust administrative remedies. *Kirk v. Bahou*, 73 A.D.2d 770, 423 N.Y.S.2d 540 (3rd Dept. 1979), *aff'd. on decision below*, 51 N.Y.2d 867, 433 N.Y.S.2d 1019 (1980). The decision of the Commission is subject to judicial review under New York *Civil Practice Laws and Rules*, Article 78.

As noted, when an individual is deprived of a property interest in public employment, due process requires a timely hearing subject to judicial review. *Loudermill, supra*, at 545, 546-548. Such a hearing generally need not be provided prior to termination, because minimal pretermination notice and an opportunity to respond satisfies due process when promptly followed by a "complete" post-termination evidentiary hearing and judicial review. *Loudermill, supra*, at 542, 545-548; and

Brock v. Roadway Express, Inc., 481 U.S. 252, 261-262, 263, 264 (1987). The constitutional adequacy of the post-termination procedures provided by a Commission appeal is subject to serious doubt.

First, despite repeated oral and written requests, petitioner was denied any information concerning the procedures to be applied in the Commission appeal. Indeed, there were and are no written procedures governing these appeals.

Second, petitioner was not given a statement in advance of the hearing of the charges against him or the evidence to be considered. *See Brock, supra,* at 481 U.S. 264-265.

Third, "witnesses" appearing before the Commission hearing were not sworn. While all witnesses, including petitioner, were asked questions, neither the questions nor the answers were preserved for review. App. D at 6. Thus, petitioner was effectively denied his right to cross-examine. Regardless of the merits of a particular case, a party whose rights are being determined at an administrative agency acting in a quasi-judicial capacity must be given the opportunity to cross-examine witnesses. *See, Brock, supra,* 481 U.S. at 264.

Fourth, the absence of a written transcript or record of the Commission appeal denied plaintiff an adequate record for judicial review. App. D at 6. Judicial review is an important part of any due process scheme. *Loudermill, supra* at 545. In this case, petitioner's only response to the charge of falsification was made orally before the Commission. He was then questioned by the Commission. Without his statement and responses, how could a court possibly review the Commission's decision?

The most egregious violation of procedural fairness was the respondents' *ex parte* submission of evidence to the Commission. This evidence consisted of five documents which addressed the falsification charge as well as issues outside that charge.

For instance, a five-page Department of Civil Service internal report about the case was submitted to the Commission. Also submitted was a newsclipping which purported to quote the petitioner. The respondents relied on this newsclipping as an admission by the petitioner that he falsified his application. The petitioner did not learn about the *ex parte* submission of evidence until the respondents answered the complaint in this Section 1983 action.

An "elementary" requirement of procedural due process is that the decision-maker must base its decision only on matters adduced at the hearing. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The principle that evidence cannot be submitted *ex parte* has been described by this Court as "...immutable in our jurisprudence." *Greene v. McElroy*, 360 U.S. 474, 496 (1959). Only recently, in *Brock*, this Court found a due process violation where an employer was denied access to information upon which the government had relied in ordering the reinstatement of a fired employee. *Id.*, at 264-265.

The Appellate Division gave some inkling of its evaluation of this issue when it held, in rejecting Mr. Richie's claim under the New York State *Administrative Procedure Act*, that there was no requirement that the Commission appeal be held on a record. App. C at 9. The New York State Court of Appeals obviously did not even consider the issue substantial enough to warrant its review. Nevertheless, this Court has repeatedly emphasized the importance of a protected property interest in one's employment. Can it be that such an important interest can be finally deprived in a post-termination "hearing" where the accused does not even get an opportunity to see and rebut all of the evidence submitted against him, and where the decision-maker is free to consider evidence adduced outside the hearing?

Respondents argued below, and may argue in opposition to this petition, that a hearing was not necessary because there

are no factual disputes in this case. This is incorrect. First, even assuming the only fact necessary for a proper disposition of petitioner's case was whether he intentionally falsified his employment application, the record contained no admission of this fact. Indeed, to establish this "admission" at the trial court, the respondents relied on the newsclipping which had been submitted *ex parte* by the Department of Correctional Services to the Commission. The reason there is no evidence on this crucial issue is because petitioner had no pretermination opportunity to address this question. He did, however, address this issue directly at the Commission appeal. He was asked questions about this issue and answered them. Because there was no transcript, petitioner's statements were not before the court. App. D at 6. This makes judicial review of this issue virtually impossible.

Second, whether petitioner intentionally falsified his application was not the only factual issue in this case. The initial disqualification decision rested in part upon allegations that petitioner was guilty of a felony conviction and that he had attempted to avoid discovery by changing the spelling of his name, date of birth and social security number. App. C at 5. App. D at 5. Petitioner denied all of these allegations.

Third, revocation under *CSL* §50(4) is discretionary. Therefore, even if the hearing procedures were adequate to fairly determine that petitioner intentionally falsified his application, there were still a number of factual disputes about the issues petitioner raised in mitigation.

A failure to properly adjudicate facts offered in mitigation is not a trivial matter. In *Loudermill, supra,* it was clear that the security guard, who was subject to the disqualification procedures provided under Ohio law, had a felony conviction on his record and had not revealed this fact on his employment application. *Id.* at 544. Nevertheless, this Court took pains to point

out how important fair procedures were because a fully informed decisionmaker might decide to exercise its discretion not to terminate an employee even if there were a basis to do so. *Id.* at 543-544. Moreover, *Loudermill* reinforces the principle that the right to a due process hearing does not depend on a party's demonstration of certain success. *Id.*, at 544; *see also, Carey v. Piphus, supra* at 266.

In summary, there is a serious question of whether the post-termination hearing provided by the New York State Civil Service Commission was constitutionally adequate. There was no statement of charges. There were no written procedures and there was no transcript to enable judicial review. Worst of all, evidence was submitted *ex parte*, and the decision-maker was not required to base its findings on the record. Can such a "hearing"[2] possibly meet the constitutional standards required before the government revokes the permanent appointment of a public employee? Based on the *Loudermill* and *Brock* decisions, this post-termination review procedure is plainly inadequate.

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[2] Indeed, the procedures followed by the Ohio Civil Service Commission, and approved in *Loudermill*, were substantially more extensive than those provided in this case. In *Loudermill*, the Civil Service Commission appointed a referee, who held a hearing. The referee made a recommendation to the full Commission, which heard arguments, made written findings of fact and conclusions of law. *Id.*, at 535. The Commission's decision was subject to judicial review. *Id.*, at 539, fn.6.

A WRIT OF CERTIORARI SHOULD BE GRANTED

The petition should be granted. A "permanent" public employee's interest in continued employment is entitled to substantial constitutional safeguards. Despite the clarity of this Court's decisions in *Loudermill* and *Brock*, the New York courts have failed to properly apply the standards set forth in those cases. The Appellate Division confused the categories of substance and procedure when analyzing the property interest at stake. The Appellate Division mistakenly found that an award of back pay is sufficient to remedy the failure to provide the pretermination notice and opportunity to respond required under *Loudermill*. Finally, the state court approved a post-termination review procedure which was not governed by written rules and where the decision-maker was free to base its findings on evidence not adduced at the hearing. Whether or not a fair hearing would have led to a different result, constitutional due process required more than this.

The petitioner respectfully prays that his petition be granted.

Respectfully submitted,

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Susan M. Moslander
Law Clerk

June 22, 1990

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held
at Court of Appeals Hall in
the City of Albany on the
twenty-seventh day of March
A.D. 1990

PRESENT, HON. SOL WACHTLER,
Chief Judge, presiding

3-10 Mo. No. 128
In the Matter of Bradley Richie

Appellant,

v.

Thomas A. Coughlin, III, & c.
et al.

Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made herein upon the part of the appellant and a motion having heretofore been made herein upon the part of the Civil Service Employees Association, Inc. for leave to file a brief amicus curiae, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements; and it is

ORDERED, that the said motion for leave to file a brief amicus curiae be and the same hereby is denied.

Donald M. Sheraw
Clerk of the Court

STATE OF NEW YORK
SUPREME COURT — COUNTY OF ALBANY

In the Matter of BRADLEY RICHIE,

Appellant,

—against—

JUDGMENT
Index No. 5597-86

THOMAS A. COUGHLIN, III, etal.,

Respondents.

Bradley Richie, 99 Miner Street, Canton, New York, 13617, represented by Richard Casagrande, Esq., Public Employees Federation, 1168-[7]0 Troy-Schenectady Road, P.O. Box 12414, Albany, New York, 12212-2414, the appellant herein, having made a motion for leave to appeal to the Court of Appeals of the State of New York from an Order of the Appellate Division of the Supreme Court, Third Judicial Department, entered in the office of the Clerk of said Appellate Division on August 2, 1989 and the Court of Appeals, after due deliberation, having rendered a decision on March 27, 1990 ordering

that the said motion be denied, with $100.00 costs and necessary reproduction disbursements, and an order having been entered so affirming, it is hereby:

ADJUDGED, that the aforesaid motion be, and the same hereby is denied, with costs of $142.00 to respondents Thomas A. Coughlin, III, as Commissioner of the Department of Correctional Services, etal., represented by the Hon. Robert Abrams, Attorney General of the State of New York, the Capitol Building, Albany, New York, 12224, and that the respondents have execution thereon.

_____

DEPUTY COUNTY CLERK

DATED AND ENTERED:

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held
at Court of Appeals Hall in
the City of Albany on the
nineteenth day of December
A.D. 1989

PRESENT, HON. SOL WACHTLER,
Chief Judge, presiding.

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3 Mo. No. 1420 SSD 99
In the Matter of Bradley Richie,
Appellant,
v.
Thomas A. Coughlin, III, & c.,
et al.,
Respondents.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Donald M. Sheraw
Clerk of the Court

APPENDIX C

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 5th day of June, 1989.

PRESENT:

HON. T. PAUL KANE,
Justice Presiding
HON. JOHN T. CASEY,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. THOMAS E. MERCURE,
Associate Justices.

In the Matter of BRADLEY RICHIE,

Plaintiff-Respondent,

-against-

THOMAS A. COUGHLIN, III, Individually and as Commissioner of the Department of Correctional Services; THE DEPARTMENT OF CORRECTIONAL SERVICES; KAREN S. BURSTEIN, Individually as Commissioner of the New York State Department of Civil Service and as President of the Civil Service Commission; JOSEPHINE L. GAMBINO and JAMES J. MCFARLAND, each Individually and as Commissioners of the Civil Service Commission; THE CIVIL SERVICE

ORDER

57115

COMMISSION OF THE STATE OF NEW YORK; and THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Defendants-Appellants

Index No. 5597-86, D.O.L. #86054127

Appellants having appealed from a judgment of the Supreme Court, Albany County (Cheeseman, J.), entered May 25, 1988, which, in a combined action for a declaratory judgment and a proceeding pursuant to CPLR [a]rticle 78, declared that petitioner (respondent herein) was not afforded due process and reinstated him to his former position with respondent Department of Correctional Services (appellant herein), and said appeal having been presented during the above-stated Term of this Court, and having been argued by Michael S. Buskus, Assistant Attorney General, of counsel for appellants and by Richard Casagrande, Esq., of counsel for respondent, and, after due deliberation, this Court having rendered a decision (per opinion of Yesawich, Jr., J.), on the 20th day of July, 1989, it is hereby

ORDERED that the judgment be and the same hereby is reversed, on the law, without costs, cross motion for summary judgment granted, complaint dismissed and it is declared that petitioner's constitutional rights have not been shown to be violated.

ENTER:

CLERK

DATED AND ENTERED: August 2, 1989

SUPREME COURT-APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

July 20, 1989 57115

In the Matter of BRADLEY RICHIE,

Respondent,

v. OPINION

THOMAS A. COUGHLIN, III, and Individually as Commissioner of the Department of Correctional Services, et al.,

Appellants.

Argued, June 7, 1989.

Before:

HON. T. PAUL KANE,

Justice Presiding,

HON. JOHN T. CASEY,
HON. ANN T. MIKOLL,
HON. PAUL J. YESAWICH, JR.,
HON. THOMAS E. MERCURE,

Associate Justices.

APPEAL from a judgment of the Supreme Court (PAUL E. CHEESEMAN, J.), entered May 25, 1988 in Albany County, which, in a combined action for declaratory judgment and a

proceeding pursuant to CPLR article 78, declared that petitioner was not afforded due process and reinstated him to his former position with respondent Department of Correctional Services.

ROBERT ABRAMS, Attorney-General (Michael S. Buskus of counsel), The Capitol, Albany, New York 12224, for appellants.

RICHARD E. CASAGRANDE, 1168-70 Troy-Schenectady Road, P.O. Box 12414, Albany, New York 12212-2414, for respondent.

YESAWICH, JR., J. 57115

Shortly after being honorably discharged in 1970 from the United States Marine Corps following two tours of duty in Vietnam, petitioner was convicted of possession of less than one gram of marihuana and hashish in North Carolina. Petitioner was sentenced to 18 months' incarceration for the crime, classified then as a misdemeanor, but after serving four months he escaped and remained a fugitive for almost 15 years.

In 1981, petitioner filled out an employment application with respondent Department of Correctional Services (hereinafter DOCS), including the question, "Have you ever been convicted of any crime (felony or misdemeanor)?", which he answered, under penalty of perjury, "No." He was hired as a temporary release interviewer in January 1983 and subsequently received a permanent appointment. In June 1985, petitioner was arrested for driving while intoxicated in New Hampshire, where a computer check revealed an outstanding warrant stemming from his 1971 escape. He agreed to be returned to North Carolina

where the escape charge was dismissed. On August 6, 1985, he was paroled on the drug charge and his parole was immediately terminated.

In the meantime, DOCS asked respondent Department of Civil Service (hereinafter the Department) to revoke petitioner's appointment based on his false statement regarding criminal convictions in his application. This request incorrectly stated that petitioner's conviction had been for a felony narcotics possession and alleged that petitioner avoided detection by changing his name, birth date and Social Security number, charges that have not been proven. On July 8, 1985, the Department mailed a notice of possible disqualification to petitioner, at an address that was outdated for over a year, despite the fact that DOCS had petitioner's correct address and knew he was then incarcerated in North Carolina; the notice was returned by the post office with a notation that the forwarding order had expired. On July 22, 1985, the Department sent a letter, again to the out-of-date address, informing petitioner that his appointment had been revoked because he had made a false statement of material fact and had practiced fraud in completing his application, citing the allegations reported by DOCS; this letter was likewise returned undelivered.

The Department, apparently prompted by an interoffice memorandum critical of the handling of petitioner's case, then wrote to petitioner at his correct address, stating that although the revocation decision had already been made he would be afforded another opportunity to submit facts and explanations in opposition to the determination. He was also informed that should the Department adhere to its determination, petitioner would have 30 days in which to appeal to respondent Civil Service Commission (hereinafter the Commission). Petitioner responded that he was entitled to a hearing prior to termination by virtue of the requirements of due process and an applicable collective bargaining agreement, and asserted that at such a hearing he would contradict the allegation that he changed

his identity, show that the crime of which he was convicted would be a mere violation now and present evidence militating against his dismissal; he demanded that he be reinstated retroactively with full back pay. In response, the Department advised that petitioner had no right to a hearing either under the provisions of the bargaining agreement or Civil Service Law 50(4) and that petitioner's letter was being treated as a timely notice of his intent to appeal.

Prior to the appeal, the Department staff furnished the Commission with a comprehensive background memorandum which petitioner did not see. Although there is no stenographic record of the appeal proceeding, it appears that during that proceeding the Commission, in addition to considering written material, heard presentations from representatives of petitioner, the Department and DOCS. On January 14, 1986, the Commission determined that petitioner should be terminated effective January 16, 1986 because of the false answer he gave on his employment application and awarded back pay for the period from the day he reported to work following his return from North Carolina to his new termination date.

Petitioner brought this action and proceeding claiming, *inter alia*, that he had been denied constitutionally guaranteed due process, that his termination was arbitrary, and that the Commission failed to comply with State Administrative Procedure Act article 3. Supreme Court, reacting to petitioner's motion and respondents' cross motion for summary judgment, held that the mailing of notices to an outdated address, the absence of safeguards against misstatements, the lack of specificity of the charges and the failure to consider the "decriminalization" of petitioner's conviction constituted a denial of minimal due process, and ordered petitioner's reinstatement pending proper proceedings under the Civil Service Law. Respondents appeal.

Reduced to its essentials, respondents' principal argument is that it is settled law in New York that if a civil servant, even

one with permanent status, makes a material misstatement on his employment application, his appointment is void *ab initio*, that he has no property interest in his employment protectible by due process and that *Cleveland Bd. of Educ. v. Loudermill* (470 US 532) has not changed that law. Respondents maintain that unlike the employee in *Cleveland Bd. of Educ. v. Loudermill (supra)*, a case otherwise very similar to the one at hand, petitioner had no property interest in his position since Civil Service Law §50(4) permits the Department to revoke the appointment of an employee, within three years of appointment, upon the discovery of facts which if known prior to appointment would have warranted disqualification, including that he made a false statement of a material fact on his application[1] (Civil Service Law §50 [4] [f]; *see, Prasad v. Merges*, 65 AD2d 663, *appeal dismissed* 46 NY2d 939, *cert denied* 444 US 861). Respondents reason that because petitioner could be terminated within three years of appointment upon discovery of the misrepresentation (Civil Service Law §50 [4]), he had no legitimate expectation of a benefit or privilege (*see, Doe v. Coughlin*, 71 NY2d 48, 55, *cert denied* _____ US _____, 109 S Ct 196).

Certainly that would be true if the Department were *required* to terminate such an employee, for his appointment would indeed then be void *ab initio*. However, since property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law," (*Board of Regents v. Roth*, 408 US 564, 577), careful attention must be paid to the language of this statute which purportedly destroys the property interest recognized in

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[1] Although Ohio has a law analogous to Civil Service Law § 50 (4) (f) (Ohio Rev Code Ann §124.25), its impact on the employee's property interest in his job was not discussed in *Cleveland Bd. of Educ. v. Loudermill (supra)*.

Loudermill.[2] *Civil Service Law* § 50(4) clearly makes the decision to revoke an appointment for any of the enumerated disqualifications *discretionary*. The statute does not render an appointment void *ab initio* upon discovery of, for instance, a false statement or even a criminal conviction, but rather affords the employee the opportunity to offer facts and explanations in opposition to termination. In making this discretionary determination the Department and the Commission are obligated not to do so arbitrarily or illegally or without having a foundation in substantial evidence (*see*, CPLR 7803 [3], [4]). In fact, in arriving at the decision here, which is based exclusively on the authority of Civil Service Law §50 (4) (i.e., not charges of misconduct or incompetence), the Department and subsequently the Commission recognized this for they considered a variety of aggravating and mitigating factors which they believed bore on how their discretion should be exercised. That is as it should be, for in exercising that discretion respondents must act with scrupulous care, and not to do so would be profoundly inappropriate conduct and would reduce the employee's right to have respondents act rationally and objectively to an empty ritual. Accordingly, we conclude that an employee in petitioner's position has a constitutionally protected property interest in his employment that survives Civil Service Law § 50 (4), albeit in a limited form,[3] in that he is entitled to expect that where there are sufficient mitigating circumstances he will not be terminated. Hence, a meaningful opportunity to invoke the discretion of the decision maker is a precondition to his termination (*see*, *Cleveland Bd. of Educ. v. Loudermill*, 470 US 532, 543, *supra*).

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[2] The property interest recognized there is created by Ohio's analogue to Civil Service Law §75, which provides that a permanent employee may not be removed except for incompetence or misconduct.

[3] To the extent *Prasad v. Merges* (65 AD2d 663, *supra*) holds to the contrary, we find it overruled by *Cleveland Bd. of Educ. v Loudermill* (470 US 532, *supra*).

The next question is whether the procedures in Civil Service Law §50 (4) provide due process appropriate to the property interest just identified. The scope of the process due depends upon the nature of the interest involved and need not be elaborate (*see, id.*, at 545). At a minimum, petitioner is entitled to a pretermination opportunity to respond, coupled with posttermination administrative review (*see, id.*, at 547). We are satisfied that the pretermination notice and opportunity to respond in writing with facts and explanations, the procedure provided for in Civil Service Law § 50(4), coupled with posttermination administrative review meets that minimum with respect to the limited property interest involved here.

Petitioner initially was undeniably deprived of the statutory pretermination notice and of an opportunity to respond. In apparent recognition of that fact, the Commission awarded petitioner back pay running up to the effective date of its decision to terminate him. In essence, petitioner's earlier termination was transformed into a suspension with pay (*see, Cleveland Bd. of Educ. v. Loudermill, supra*, at 545). Since petitioner's effective termination did not come about until after his hearing before the Commission, of which he was given prior notice and at which he had an opportunity to respond, he was not deprived of his constitutional right to due process; reinstatement and a further hearing would therefore be redundant.

As for petitioner's contention that his hearing before the Commission should have been conducted in accordance with State Administrative Procedure Act article 3, which governs adjudicatory proceedings, we note that since petitioner did not cross-appeal from Supreme Court's failure to grant the requested relief our right to entertain this argument is, at best, dubious (1 Newman, NY Appellate Practice §§ 3.03, 5.08, at 3-5, 5-28). But even if the issue is properly before us, it is without merit inasmuch as the administrative appeal proceeding had herein was not required by law to be made on the record (see, State Ad-

ministrative Procedure Act §102 [3]; *Matter of Mary M. v Clark*, 100 AD2d 41, 43).

Opinion by YESAWICH, JR., J., in which KANE, J.P., CASEY, MIKOLL and MERCURE, JJ., concur.

Judgment reversed, on the law, without costs, cross motion for summary judgment granted, complaint dismissed and it is declared that petitioner's constitutional rights have not been shown to be violated.

APPENDIX D

At a Term of the Supreme Court
of the State of New York, held
in and for the County of Albany
on the 7th day of March, 1988.

PRESENT: HONORABLE PAUL E. CHEESEMAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of BRADLEY RICHIE, Plaintiff, -against- THOMAS A. COUGHLIN, III, Individually and as Commissioner of the Department of Correctional Services; THE DEPARTMENT OF CORRECTIONAL SERVICES; KAREN S. BURSTEIN, Individually as Commissioner of the New York State Department of Civil Service and as President of the Civil Service Commission; JOSEPHINE L. GAMBINO and JAMES J. MCFARLAND, each Individually and as Commissioners of the Civil Service Commission; THE CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK; and THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, Defendants.	JUDGMENT Index No. 5597-86 Justice Cheeseman

The plaintiff having commenced this action for a judgment pursuant to 42 U.S.C. § 1983, the Fourteenth Amendment to the United States Constitution, Article 1, § 6 of the New York

State Constitution, *CPLR* Article 78 and *CPLR* § 3001, seeking declaratory and injunctive relief and back pay against the defendants, and the plaintiff having moved for summary judgment in this action, and the defendants having cross-moved for summary judgment,

NOW, upon reading and filing plaintiff's Summons and Complaint and annexed exhibits dated May 14, 1986; the Notice of Motion and Motion for Summary Judgment dated December 29, 1987, together with the annexed affidavit of Richard E. Casagrande, Esq., dated December 29, 1987 and annexed exhibit; the supplemental affidavit of Richard E. Casagrande, Esq., dated March 8, 1988; the Verified Answer dated July 10, 1986, together with the supporting affidavit of Paul J. Vella dated July 10, 1986 and annexed exhibits; the Notice of Cross-Motion and Cross-Motion for Summary Judgment dated February 11, 1988; and this matter having duly come on to be heard before a Term of this Court held in the Albany County Court House on March 7, 1988; and Richard E. Casagrande, Esq., having appeared and presented oral argument on behalf of plaintiff; and the Honorable Robert Abrams, by Robert A. Siegfried, Esq., Assistant Attorney General, having appeared and presented oral argument on behalf of defendants; and after due deliberation the Court having rendered a written decision dated May 10, 1988, a copy of which is annexed hereto; it is hereby:

DECLARED that defendants deprived plaintiff of his Constitutional right to due process of law in failing to provide him with adequate pretermination notice and an opportunity to respond prior to the termination and an adequate post-termination hearing; and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff's Motion for Summary Judgment is granted; and it is further

ORDERED, ADJUDGED AND DECREED that defendants' Cross-Motion for Summary Judgment is denied; and it is further

ORDERED, ADJUDGED AND DECREED that defendants shall reinstate plaintiff to his former position with all back pay, seniority and other benefits from the date of his termination pending any proper proceedings under the *Civil Service Law*.

DATED: HONORABLE PAUL E. CHEESEMAN
Justice of the Supreme Court

Enter:

DECISION

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of BRADLEY RICHIE,

Plaintiff,

-against-

THOMAS A. COUGHLIN, III, Individually and as Commissioner of the Department of Correctional Services; THE DEPARTMENT OF CORRECTIONAL SERVICES; KAREN S. BURSTEIN, Individually as Commissioner of the New York State Department of Civil Service and as President of the Civil Service Commission; JOSEPHINE L. GAMBINO and JAMES J. MCFARLAND, each Individually and as Commissioners of

the Civil Service Commission; THE CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK; and THE NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

Defendants.

(Supreme Court, Albany Co. Motion Term)
RJI No. 01-88-012614

(Justice Paul E. Cheeseman, Presiding)

DECISION

APPEARANCES: Richard E. Casagrande
William P. Seamon, of Counsel
Attorney for Plaintiff
1168-70 Troy-Schenectady Road
P.O. Box 12414
Albany, New York 12212-2414

Robert Abrams
Attorney General of the
State of New York
Robert A. Siegfried, Assistant
Attorney General, of Counsel
Attorney for Defendants
The Capitol
Albany, New York 12224

DECISION

CHEESEMAN, J:

The Plaintiff seeks an Order pursuant to 3212 of the *CPLR* in his action brought pursuant to 42 U.S.C. Section 1983, the Fourteenth Amendment to the United States Constitution, Article 1, Section 6 of the New York State Constitution, *CPLR* Article 78 and *CPLR* Section 3001, seeking declaratory and injunctive relief and backpay against the defendants.

The plaintiff was appointed by the Department of Correctional Service (hereinafter "DOCS") as a Temporary Release Interviewer, grade 14. He completed his probationary period and became a permanent appointee on December 20, 1983.

On June 8, 1985, Petitioner was arrested for driving while intoxicated in Grafton County, New Hampshire. A check by the authorities in New Hampshire revealed a 1971 warrant from the State of North Carolina stemming from a charge of escape. Petitioner voluntarily returned to North Carolina on June 21, 1985.

On June 17, 1985, DOCS requested the Department of Civil Service to immediately revoke Petitioner's permanent appointment under Civil Service Law Section 50 subdivision 4. The request asserted confirmation of Petitioner's legal difficulties in North Carolina and further asserted that Petitioner had changed his name, social security number and date of birth in an effort to conceal his problem in North Carolina, and it also asserted that the Petitioner had been convicted of a "felony narcotic possession."

On July 8, 1985, the Director of Investigations for the Department of Civil Service mailed Petitioner a "Notice of Possible Disqualification", to an outdated address, knowing full well the Petitioner had returned to North Carolina to answer the

charge of escape. Thereafter, on July 22, 1985, the Civil Service Department mailed another letter to an outdated address revoking Mr. Richie's appointment. This letter like the letter of July 8, 1985 was returned by the Postal Service as undeliverable.

On July 25, 1985 the charges against Mr. Richie were dismissed in North Carolina, and on August 6, 1985 the North Carolina Parole Commission terminated their handling of Petitioner and he returned to New York on August 8, 1985.

Petitioner, on November 7, 1985 by his attorney, requested a hearing before a neutral arbitrator. The Civil Service Commission denied his request for this hearing by letter dated November 18, 1985 stating that Mr. Richie had not responded to their October 7, 1985 letter and that "the record before me now shows only unrebutted information supplied to this agency indicating that Mr. Richie had been convicted of a crime in 1970. For the reasons indicated above, your request for a hearing is denied."

On December 3, 1985, Mr. Richie was advised that the Civil Service Commission would hear an appeal on December 17, 1985. By letter dated December 16, 1985, Mr. Richie, by his attorneys, made a written submission to the Commission.

This submission requested recession of the revocation, reinstatment, and a new investigation, a pre-termination hearing, and if Petitioner's appointment was revoked, a post-termination hearing pursuant to his constitutional guarantees of due process and the State Administrative Procedure Act (hereinafter "SAPA").

On December 17, 1985, the Commission met to consider an "appeal" by Mr. Richie of his revocation. No formal record is kept of that hearing and it is therefore difficult to review the process as conducted by the Commission. It is known from the affidavits that the Commission was told that part of the basis

for the initial disqualification was the alleged attempts to conceal Petitioner's 1970 arrest and that the crime for which Mr. Richie was convicted in 1970, i.e., possession of one gram of marijuana was no longer a misdemeanor or a jailable offense in North Carolina.

Despite these facts, and no apparent corroboration of his intent to conceal his identity, the Commission by letter dated January 14, 1986 determined that his appointment should be terminated.

The Commission however sustained Petitioner's back pay request, and awarded back pay from August 9, 1985 to January 15, 1986. This action then ensued.

The issue before us is whether Petitioner was afforded his due process rights in this pre-termination notice and his post-termination proceeding. We find he was not.

The record before us indicates arbitrary capricious actions were taken to terminate Petitioner. Despite being aware that Mr. Richie was in the State of North Carolina, the Department of Civil Service mailed a notice of its intent to an outdated address and after its return as undeliverable, the Department mailed its revocation letter to the very same address.

The State's argument that Petitioner has no property interest in his position (*Bd. of Regents v. Roth*, 408 US 564, 577 (1972)), is based upon the faulty premise that had DOCS known of Petitioner's conviction for possession of less than one gram of marijuana in 1970, that he would not have been hired. This is putting the proverbial cart before the horse. (See *Cleveland Bd. of Ed. v. Loudermill*, 470 US 532, 84 L.Ed2d 494, 502 [footnote 5]). While it is true that Civil Service Law Section 50.4 provides for termination of an appointee "upon finding of illegality, irregularity or fraud of a substantial nature," this again presupposes a pretermination hearing wherein the appoin-

tee has a minimal procedural right to be heard. (*Logan v. Zimmerman Brush Co.*, 455 US 422, 71 L Ed2d 265), something which was not done in this case.

The essential principle of due process is that a deprivation of life, liberty or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case" (*Mullane v. Central Hanover Bank and Trust Co.*, 399 US 306, 94 L Ed 865; *Cleveland v. Loudermill, supra.* at 503))

We cannot say that respondents complied with a reasonable standard of due process when they mailed their notice to an outdated address at a time when they were aware of Petitioner's absence from the State.

Certainly, since DOCS requested that the action be taken, Civil Service could have secured a current address from DOCS to mail the notice. The denial of due process is compounded by the use of innuendo and misstatements of fact, regarding the social security number and date of birth to deprive a person of his livlihood.

The very fact that Civil Service, by its October 7, 1985 letter afforded Petitioner "an opportunity to make an explanation" admits it failed to afford Mr. Richie that opportunity prior to termination.

The post-termination proceedings also lacked in minimal due process safeguards as defined by the Court of Appeals in *Mingo v. Pirnie*, 55 NY2d 1019, affirming 78 AD2d 984, in view of the misstatements regarding the concealing identity issue, the lack of specificity to the charges and the decriminalization of the 1970 marijuana conviction.

Accordingly, in view of the above, the Petitioner's motion for Summary Judgment is granted. Petitioner shall be reinstat-

ed with full back pay to his position of Release Interviewer, Grade 14, pending any proper proceedings under the Civil Service Law which may be taken.

PAUL E. CHEESEMAN
J.S.C.

DATED: May 10, 1988
AT ALBANY, NEW YORK

APPENDIX E

§6 [Grand jury; waiver of indictment; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, except that a person held for the action of a grand jury upon a charge for such an offense, other than one punishable by death or life imprisonment, with the consent of the district attorney, may waive indictment by a grand jury and consent to be prosecuted on an information filed by the district attorney; such waiver shall be evidenced by written instrument signed by the defendant in open court in the presence of his counsel. In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to bear witness against himself, providing, that any public officer who upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand

jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

Amended Nov. 8, 1938; Nov. 8, 1949; Nov. 3, 1959; Nov. 6, 1973, eff. Jan. 1, 1974.

APPENDIX F

§75. Removal and other disciplinary action

1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who was honorably discharged or released under honorable circumstances from the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer firefighter as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee holding a position in the non-competitive class other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the noncompetitive class, who since his last entry into city service has completed at least three years of continuous service in such position in the non-competitive class, or

(e) an employee in the service of a police department within the state of New York holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise.

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

(As amended L.1983, c. 774, §1; L.1984, c. 710, §1, L.1985, c. 842, §§ 1,2; L.1986, c.439, §2; L.1989, c.350, §1.)

APPENDIX G

§50. Examinations generally

1. Positions subject to competitive examinations. The merit and fitness of applicants for positions which are classified in the competitive class shall be ascertained by such examinations as may be prescribed by the state civil service department or the municipal commission having jurisdiction.

2. Announcement of examination. The state civil service department and municipal commissions shall issue an announcement of each competitive examination, setting forth the minimum qualifications required, the subjects of the examination, and such other information as they may deem necessary, and shall advertise such examination in such manner as the nature of the examination may require. Such announcement and advertisement shall each inform prospective applicants of the options for religious observance provided in subdivision eight of this section.

3. Application for examination. The civil service department and municipal commissions shall require prospective applicants to file, during a prescribed time, a formal application in which the applicant shall state such information as may reasonably be required touching upon his background, experience and qualifications for the position sought, and his merit and fitness for the public service. The application shall be subscribed by the applicant and shall contain an affirmation by him that the statements therein are true under the penalties of perjury. Blank forms for such application shall be furnished by said department and such municipal commissions without charge to all persons requesting the same. The department and such municipal commissions may require in connection with such application such certificates of citizens, physicians, public officers or others having knowledge of the applicant, as the good of the service may require.

4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible

(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies; or

(b) who is found to have a physical or mental disability which renders him unfit for the performance of the duties of the position in which he seeks employment, or which may reasonably be expected to render him unfit to continue to perform the duties of such position; or

[(c) Repealed]

(d) who has been guilty of a crime; or

(e) who has been dismissed from a permanent position in the public service upon stated written charges of incompetency or misconduct, after an opportunity to answer such charges in writing, or who has resigned from, or whose service has otherwise been terminated in, a permanent or temporary position in the public service, where it is found after appropriate investigation or inquiry that such resignation or termination resulted from his incompetency or misconduct, provided, that in cases of dismissal, resignation or termination after written charges of incompetency, the examination or certification in question be for a position that requires the performance of a duty or duties which are the same as or similar to the duty or duties of the position from which the applicant has been dismissed, resigned or terminated on account of incompetency; or

(f) who has intentionally made a false statement of any material fact in his application; or

(g) who has practiced, or attempted to practice, any deception or fraud in his application, in his examination, or in securing his eligibility or appointment; or

(h) who has been dismissed from private employments because of habitually poor performance.

No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud.

5. Application fees. (a) Every applicant for examination for a position in the competitive or non-competitive class, or in the labor class when examination for appointment is required, shall pay a fee to the civil service department or appropriate municipal commission at a time determined by it. Such fees shall be dependent on the minimum annual salary announced for the position, as follows: (1) on salaries of less than three thousand dollars per annum, a fee of two dollars; (2) on salaries of more than three thousand dollars and not more than four thousand dollars per annum, a fee of three dollars; (3) on sa-

laries of more than four thousand dollars and not more than five thousand dollars per annum, a fee of four dollars; and (4) on salaries of more than five thousand dollars per annum, a fee of five dollars. If the compensation of a position is fixed on any basis other than an annual salary rate, the applicant shall pay a fee based on the annual compensation which would otherwise be payable in such position if the services were required on a full time annual basis for the number of hours per day and days per week established by law or administrative rule or order. Fees paid hereunder by an applicant whose application is not approved may be refunded in the discretion of the state civil service department or of the appropriate municipal commission.

(b) Notwithstanding the provisions of paragraph (a) of this subdivision, the state civil service department, subject to the approval of the director of the budget, a municipal commission, subject to the approval of the governing board or body of the city or county, as the case may be, or a regional commission or personnel officer, pursuant to governmental agreement, may elect to waive application fees, or to abolish fees for specific classes of positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; provided, however, that fees shall be waived for candidates who certify to the state civil service department that they are unemployed and primarily responsible for the support of a household.

(c) All fees collected hereunder by the state civil service department, except as hereinafter provided, shall be paid into the state treasury in the manner prescribed by the state finance law. Fees collected from applicants for examinations given exclusively for positions in the division of employment in the department of labor shall be held in trust until such time as the

costs of such examinations have been ascertained and thereupon shall be disbursed as follows: (1) to the extent that such fees are sufficient therefor, there shall be paid into the unemployment administration fund maintained under the unemployment insurance law, an amount equal to the costs of such examinations. Such payments shall be made on the fifth day of the month following the month in which such costs were ascertained and shall be accompanied by a detailed, verified statement and a duplicate of such statement shall be filed on the same day with the state comptroller; (2) the balance, if any, of such fees shall be paid into the state treasury pursuant to the state finance law.

(d) All fees collected hereunder by any municipal civil service commission shall be paid into the general fund of the municipality for which such commission has been appointed.

6. Scope of examinations. Examinations shall be practical in their character and shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of that service into which they seek to be appointed. The state civil service department or appropriate municipal commission, as the case may be, may establish an eligible list on the basis of ratings received by the candidates in the competitive portions of the examination and thereafter conduct medical, physical and other appropriate non-competitive qualifying tests from time to time as the need for certifications from the eligible list may require.

7. Court review of examination questions and answers. Where the state civil service commission or appropriate municipal civil service commission has, following its duly established review procedures, which in the case of the city of New York are set forth in section fifty-a of this chapter, made a final determination as to the answers that are acceptable on a particular examination, such determination shall not be subject to further review in any court. Court review shall be limited

to be a determination of whether such duly established review procedures were followed, and the court shall have no authority to determine whether the commission's determination was correct.

8. Limitation of eligibility to one sex. The state civil service department or the municipal commission having jurisdiction may limit eligibility for examination to one sex when the duties of the position involved relate to the institutional or other custody or care of persons of the same sex, or visitation, inspection or work of any kind the nature of which requires sex selection.

9. Examination of candidates unable to attend tests because o[f] religious observance. A person who, because of his religious beliefs, is unable to attend and take an examination scheduled to be held by the state department of civil service or a municipal commission on a Saturday or on a day which is a religious holiday observed by him, shall be permitted to take such examination on some other day designated by the state department of civil service or appropriate municipal commission, at a reasonably comparable time and place without any additional fee or penalty.

10. The term "physical or mental disability" as used in this section, means a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques. Determination of physical or mental disability shall be made by a medical officer employed or selected by the civil service department or the municipal commission having jurisdiction.

(As amended L.1985, c. 845, §1; L.1986, c. 783, §1; L.1986, c.783, §1; L.1988, c. 611, §1; L.1989, c.61, §195.)

APPENDIX H

§6. Powers and duties of the state civil service commission
The state civil service commission shall

1. Prescribe and amend suitable rules and regulations for carrying into effect the provisions of this chapter and of section six of article five of the constitution of the state of New York, including (a) rules for the jurisdictional classification of offices and positions in the classified service of the state; (b) rules for examinations, appointments, promotions, transfers, leaves of absence, resignations and reinstatements, and the keeping, reporting and reviewing of performance ratings of employees in the classified service of the state and civil divisions for which the provisions of this chapter are administered by the state civil service department; (c) rules for sick leaves, vacations, time allowances and other conditions of employment in the classified service of the state and, notwithstanding any other provision of this chapter or any other law, such rules may provide for cash payment of the monetary value of accumulated and unused vacation or time allowances granted in lieu of overtime compensation standing to the credit of an employee at the time of his separation from service or his entrance into the armed forces of the United States for active duty (other than for training) as defined by title ten of the United States code, whether or not such entrance constitutes a separation from service, and for the payment of the monetary value of his accumulated and unused time allowances granted in lieu of overtime compensation standing to the credit of an employee at the time of his appointment, promotion or transfer from the department or agency in which such time allowances were earned to another department or agency and provided further however that any such rules or regulations shall provide that individuals certified as visually handicapped by the commission for the visually handicapped, and individuals who have a hearing impairment manifested by a speech discrimination score of forty percent or less in the better ear with appropriate correction as certified by a licensed audiologist or otorhinolaryngologist as defined in section seven hundred eighty-one of the general business law,

as added by chapter seventy-five, or a physician who has examined such person pursuant to the provisions of section seven hundred eighty-four of such law, may charge against accumulated sick leave credits and upon written agreement between the individual and the employer, may borrow against sick leave credits not yet accumulated, for the purpose of obtaining guide dogs and necessary training, up to a maximum of twenty-six days in any one year; and (d) rules for the position classification and jurisdictional classification of offices and employees in civil divisions for which the provisions of this chapter are administered by the state civil service department.

Such rules and any modification thereof shall take effect when approved by the governor and filed in the office of the department of state, and shall have the force and effect of law;

2. Keep minutes of its own proceedings and records of its other official actions;

3. Make investigations concerning all matters touching upon the enforcement and effect of the provisions of this chapter and the rules and regulations established thereunder and concerning the action of any person in respect to the administration of this chapter. In the course of such investigations each member and any officer or employee previously designated in writing by the commission to conduct investigations or hearings in its behalf shall have power to administer oaths. A record of such written designation shall be kept on file in the office of such commission;

4. Have power to subpoena and require the attendance in this state of witnesses and the production of books and papers pertinent to the investigation and inquiries hereby authorized and to examine them and such public records as it shall require relating to any such matter. For the purposes of such examination, the commission possesses all the powers conferred by the legislative law upon a committee of the legislature or by the

civil practice law and rules, upon a board or committee. A subpoena issued under this section shall be regulated by the civil practice law and rules. Said commission and any officer or employee previously designated in writing by it to act in its behalf may invoke the power of any court of record in the state to compel witnesses to attend, testify and produce books and papers;

5. Hear and determine appeals instituted by any person believing himself aggrieved by any action or determination of the president of the commission acting as the head of the department, made under the authority conferred upon such president or department under the provisions of this chapter except article eleven hereof; provided, however, that no such appeal shall be allowed (a) if the action or determination involved relates solely to matters of internal management of the department, or (b) if the action or determination involved was considered and approved in advance by the commission. The appeals authorized by this subdivision shall be instituted by applications in writing to the commission within thirty days of the action or determination to be reviewed. The commission, for good cause shown, may waive such thirty-day limitation. The commission may make such investigation or inquiry into the facts relative to the action or determination appealed from as may be deemed advisable and may affirm, reverse or modify such action or determination;

6. Make determinations of all appeals filed with the state commission pursuant to the provisions of section one hundred twenty of this chapter;

7. Meet in Albany at least once in each calendar month, except the month of August, and hold such other meetings at such places within the state as the needs of the public service may require. A majority of the members of the commission shall constitute a quorum.

APPENDIX I

§66.4 The examination process; conduct of investigations

(a) The State Civil Service Department may conduct investigations concerning the qualifications of candidates, eligibles and appointees for State positions or public authorities under the jurisdiction of the department. The scope of these investigations may include training, experience and character qualifications or any area pertinent to the suitability of the candidate, eligible or appointee for employment. The investigation of candidates, eligibles or appointees shall be as complete as is necessary to make an informed evaluation and determination. This may include the taking of fingerprints and physical descriptive data of such candidate, eligible or appointee and submission to the Division of Criminal Justice Services for processing.

(b) Each case involving a criminal conviction shall be considered on its own merits. A candidate, eligible or appointee shall not automatically be disqualified or barred from appointment solely on the basis of a criminal conviction unless mandated by statute.

(c) In review of the criminal convictions full consideration shall be given to the following:

(1) Nature and seriousness of the offense;

(2) Circumstances under which the offense was committed;

(3) Lapse of time since the offense was committed;

(4) Individual's age at the time of the offense;

(5) Social conditions which may have fostered the offense;

(6) Relationship of the nature of the offense to the position sought;

(7) Number of criminal convictions;

(8) Honesty of the candidate in admitting the conviction record; and

(9) Evidence of rehabilitation as demonstrated by the individual's good conduct while in correctional custody and/or the community; counseling or psychiatric treatment received; acquisition of additional academic or vocational schooling; successful participation in correctional work-release programs and the recommendation of persons who have or have had the applicant under their supervision.

(d) Any person who is disqualified as the result of an investigation conducted pursuant to this section shall be advised, in writing, of the reason for such disqualification. Any person so disqualified may appeal such disqualification by submitting a written explanation, supported by available documentary evidence, containing a short and plain statement of the facts upon which he relies to show that such disqualification was incorrect. Such appeal shall be filed with the President of the Commission within 10 days of the date of the written notice of disqualification. Any appointee who has been disqualified pursuant to this section shall be continued in service until the end of the appeal period provided in this section or, in the event a timely appeal is filed, until a final determination is made, as the case may be, provided, however, nothing contained in this section shall be deemed to permit an employee's continuation in service beyond the probationary period otherwise applicable or when such employee's service would have otherwise been terminated or would have ceased under law.